REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO 31 of 2021

(BEFORE THE HONOURABLE JUSTICE D MADISE)

(BEING CIVIL CAUSE NUMBER 720 OF 2018 BEFORE H/W IBRAHIM SITTING AT MIDIMA COURT, BLANTYRE)

BETWEEN:

ZIZIPIZYANI KAYIRA.....1ST APPELLANT

NICO GENERAL INSURANCE COMPANY LTD..... 2ND APPELLANT

-AND-

HOSPICEOUS JABESI (Suing Through TREVA JABESI, Litigation Friend)..... RESPONDENT

Coram; **Hon Mr. Justice D. Madise**

Mr. V. Jele for the Appellant

Mr. Y. Domasi for the Respondent

Mr. F. Mathanda Clerk

JUDGMENT

Madise, J

Introduction

1. The Respondent a father commenced this matter as a litigation friend on behalf of his son in the court below claiming damages for personal injuries sustained in a road accident at Mkaika Trading Centre where he was hit by a motor vehicle registration number CP 4283 Toyota Hilux which was being driven by the 1st Appellant and insured by the 2nd Appellant. The Appellants lost the case in the court below and being dissatisfied with that finding now appeal to this court against the judgment. I'm mindful that appeal in this court are by way of re hearing of all the evidence, the law applied and the reasons behind the decision. The purpose is to ensure that the court below was within the ambit of the law when it made the decision.

Facts.

2. The Respondent commenced this matter claiming damages for personal injuries sustained in a road accident at Mkaika Trading Centre where he was hit by motor vehicle registration number CP 4283 Toyota Hilux which was being driven by the 1st Appellant and insured by the 2nd Appellant.

3. In his pleadings, the Respondent pleaded among other particulars of the negligence that the 1st Appellant drove at an excessive speed in the circumstances, drove without due care and attention, and he failed to swerve, slow down or in any way manage or control his vehicle so as to avoid the accident. Further the Respondent relied on the doctrine of *res ipsaloquitor* and an admission made by the 1st Appellant at the police station as evidence that he was negligent.

4. The matter was duly heard and the Respondent paraded one witness whose testimony was basically what is in the pleadings. The Appellants on the other hand told the court that the driver of the vehicle was only moving at 40 km/hr and that the boy suddenly entered the road as he was following an adult who had already crossed the road. They blamed the adult for leaving the minor behind. On 7th January, 2019 His Worship Ibrahim found the 1st Appellant liable for the accident and awarded the Respondent the sum of MK1,800,000.00

as damages for pain and suffering and loss of amenities if life. The Appellants now appeal against that decision.

Grounds of Appeal

5. Whether the Respondent had discharged the burden of proof as required at law in proving that the 1st Appellant was negligent.

   Whether a finding of liability could be based on the fact that the minor cannot be found held to have been contributorily negligent.

   Whether the magistrate could make a finding on the speed at which the 1stAppellant was driving without admitting evidence on the same.

   Whether the magistrate's decision was against the weight of evidence given in court and the law on the matter.

Burden and Standard of Proof

6. The burden and standard of proof in civil matter is this. It is trite law that he who alleges the existence of certain facts is legally bound to prove his/her case as a positive is always easier to prove that a negative. The standard required is on a balance of probabilities. The scale must tilt towards the claimant's story for him/her to succeed. If the scales are evenly balanced, the claim must fail. As Denning J, stated in ***Miller vs. Minister of Pensions*** [1947] 2 A II E.R. 372.

   If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

Negligence as a tort

7. The best definition of negligence was given by Baron Alderson in ***Blyth vs Birmingham Water Works*** (1856) I Ech 781 at 784.

   "Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. See ***Banda*** **vs.** ***Southern Bottlers Ltd*** Civil Cause No. 558 of 2010 (High Court) (unreported). For a better understanding of the tort of negligence read ***Winfield and Jolwicz*** on tort 14 Ed page 78. On duty of care Lord Atkin stated in ***Donoghue*** **vs.** ***Stevenson*** (1932) AC, 562 as follows:-

"A person's neighbors are those persons who are closely and directly affected by any act that I ought reasonably to have them in contemplation as being affected when in directing my mind to the acts or omissions which are called in question".

The maxim *res Ipsa loquitur* sums up the law on negligence"

The Appellant's Skeleton Arguments.

8. The Appellants submitted that in civil cases, the legal burden to prove any fact rests upon the party who substantially asserts the affirmative of a fact in issue and to whose claim the fact in issue is essential. It does not lie on the party who denies the truth of the fact in issue. The rule is *Ei qui affirmat non qui negatincumbitprobatio* which means the burden of proof lies on him who alleges and not on him who denies.t They cited ***Commercial Bank of Malawi v. Mhango*** [2000 – 2001] MLR 43 (SCA);***Limbe Leaf Tobacco v. Chikwawa and Others*** [1996] MLR 480 at p.484. ***Miller v. Minister of Pensions*** [1947] All ER 372, 373, 374; ***Tembo and Others v. Shire Bus lines Limited*** [2004] 405 at p. 413

Negligence

9. On negligence they Appellants submitted that it is defined as the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. ***Blyth v Birmingham waterworks Co.*** (1856) 11 Ex 781 at 784

10. That in order for a claim to succeed the Plaintiff must prove that there was a duty of care owed to them and that the same was breached by the defendant and as a result they have suffered injury, loss, damage or injury which can directly be attributed to the breach and is not remote as per ***Donoghue v Stevenson*** [1932] AC 562.

Driver's duty of care.

11. That a driver of a motor vehicle owes a duty of care to other road users not to cause damage to a person, vehicle and property of anyone on the road. He must use reasonable care which an ordinary competent driver would have exercised under all circumstances. ***Chuma and another v India and others*** [1995] 1 MLR 97

12. That it is the duty of a driver or rider of a vehicle to keep a good look out. He must look-out for other traffic which is or may be expected to be on the road, whether in front or at the back or alongside him, especially at cross – roads, junctions or bends. This duty is on all drivers, whether on the main roads or emerging from the side roads. A driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if a sudden emergency arises ***R v Sinambale*** ALR (Mal) 191. A driver of a motor vehicle breaches the duty of care if he acts below the standard of a reasonable driver. A reasonable and competent driver has been defined as a driver who avoids excessive speed, keeps a good lookout and observes traffic signs and signals. ***Banda and others v ADMARC and another*** (1990) 13 MLR 59

13. That in cases where the victim of a road accident is an infant child, courts are very slow to find them to have been contributorily negligent unless the infant is of such an age as reasonably expected to take precautions for his or her own safety: ***Gough v Thorne*** [1966] 3 ALL ER 399; ***Jones v Lawrence*** [1969] 3 ALL ER 267. That in ***Dilla v Rajani*** (supra), a 6 year old child abruptly ran into the road in which the Defendant driver was driving his vehicle at a speed of 20 miles per hour (about 32 km/hr.). In dismissing the Plaintiff's claim and holding that the child was blameworthy, Mtegha, Ag. J., quoting with approval Denning M.R in ***Gough v Thorne*** (supra) as stated at pages 116-117

14. That in the case of ***Law Yuen Wan (an infant) by her mother and next friend Ng Yuk Ying v Tai Kan Tong and Others***[1983] HKCF1 162, the infant Plaintiff, aged 4½ years was hit and injured when he abruptly ran into the road and collided with the 1st Defendant's lorry. Relying on ***Gough v Thorne*** (supra) and ***Jones v Lawrence*** (supra),

the Hong Kong Court of First Instance held that although the Plaintiff's act of crossing the road without first checking whether it was safe to do so constituted contributory negligence, the child could not to be held liable of contributory negligence because of her tender age.

15. On appeal to the Hong Kong Court of Appeal, [1984] HKCA 281), the Court reversed the decision of the Court of First Instance and found that the driver of the lorry was not negligent because he could not have expected that a child of such a tender age would abruptly cross the road unattended. The Court stated at paragraph 8 of its judgment: *"The 1st Defendant had no reason to believe that very young, unattended children would be attempting to cross the road and he was entitled to assume that parents and other persons in loco parentis would be able to central the children in their care. If we were to hold that he ought to have anticipated that a child might do what this Plaintiff did, it would bring traffic in the vicinity of every kindergarten and primary school almost to a standstill."*

That those that are in charge of children are required to exercise reasonable care for the children's safety:

Res ipsa loquitor

16. The Appellants submitted that in ***Barkway v South Wales Transport*** [1950] 1 All ER 392, the House of Lords described the application of the doctrine of *res ipsaloquitor* as no more than a rule of evidence affecting onus of proof. The essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself, evidence of negligence, depending on the absence of explanation of the accident, but it was the duty of the Respondents to give an adequate explanation if facts were sufficiently known, the question ceased to be one where the facts spoke for themselves and the solution would be found by determining whether or not, on the established facts negligence could be said to have been proved.

17. That in ***Kalea v Attorney General*** [1993] 16(1) MLR 152, the Court held that where a Plaintiff relies on the doctrine of *res ipsa loquitor*, it would only apply to situations where the cause of the damage was not known and where the Plaintiff alleged that the cause spoke for itself and where the Plaintiff has raised a prima facie cause of negligence on the part of the Defendant, it is the duty of the Defendant to rebut the presumption. The maxim *res ipsaloquitor* applies under the following conditions (1) where the happening of an occurrence has not been explained or the cause is not known, (2) when the occurrence is one which would not have happened in the ordinary cause of things without negligence on the part of somebody other than the Plaintiff, (3) the circumstances part to the negligence in question being that of the Defendant rather them that of any person. See **Kalea vs Attorney General (supra) at page 186.**

Conclusion

18. That from the law as cited above, it is trite that the burden of proof in civil matters such as this one rests on the Claimant to prove that a Defendant was negligent. The Claimant must not only prove that the 1st Defendant owed him a duty of care but also that there was breach of the duty of care which caused him to suffer loss. Where the Claimant has failed to discharge the evidential burden then the Defendant cannot be found to be liable.

19. That according to ***Malipa v Kalichero and Prime Insurance Company Limited*** **(supra)**, the mere fact that an accident happened does not in itself impute that the 1st Defendant herein was negligent. The Respondent herein pleaded particulars of negligence and it was his duty to specifically prove the particulars to the extent to which the 1stAppellant caused the accident. That the record will show that on the hearing of this matter, the witness of the Respondent simply adopted his witness statement which merely lists down some of the particulars of negligence as put down in his statement of claim.

20. That the witness statement by itself does not prove how the 1st Defendant failed in his duty as a driver or that the 1stAppellant drove at a higher speed than what is prescribed for a Trading Centre. In the same way, the said witness admitted in cross examination that the Respondent was not only crossing the road where there was no pedestrian crossing but also

that that he was following an adult who had already crossed the road. The admission by the Respondent's witness, his father, proves that the adult who was with the minor was the one who was negligent and influenced the accident by leaving the minor to cross a road unassisted.

21. That similarly, in ***Godfrey Mwangonde vs Sam Nyirenda and others*** Civil Cause 282 of 2013, Justice Ligowe stated that it is normal that the statement of case is affirmative and the defence is negative about what happened in a matter. On this basis, the Plaintiff must substantiate his claims in the statement of claim by cogent evidence during trial. It is therefore the Appellants' argument that the Respondent herein failed to substantiate his claim with specific elements on the negligence of the 1st Respondent during trial.

22. That the learned magistrate ignored the testimony of the 1stRespondent who stated that the Respondent entered the road at a very close range and inadvertent to oncoming traffic such that it was impossible for the 1stAppellant to stop his vehicle so as to avoid hitting him. This testimony can be corroborated by the police report which stated that their investigation revealed that the 1st Appellant was not at fault. In order for the lower court to find that the 1st Appellant was negligent, it ought to have first established that the 1st Appellant failed as a reasonable driver to discharge his duty in the circumstances of the accident. To the contrary, the court concluded that since the 1stAppellant was driving a pick-up, which had too much power, and that a speed of 40 kilometers per hours was fast in the circumstances when the prescribed speed limit for the said place was 50 kilometers per hour.

23. That the model of the car is an irrelevant consideration in determine the speed at which a vehicle was travelling since speed is a constant factor for all vehicles in motion. The 1stAppellant's evidence as to the speed at which he was driving at was uncontroverted and without any evidence contrary to the same, it was erroneous to conclude that he was driving too fast in the circumstances. That in the above, it is clear that the accident herein was caused by the minor who was crossing the road without any assistance from an adult.

24. Apart from the above, the Respondent also pleaded that they would rely on the doctrine of *res ipsa loquitor*. However, the said doctrine applies to situations where the cause of the damage was not known and where the Respondent alleged that the cause spoke for itself. Where the Claimant in a matter has raised a prima facie case of negligence on the part of the Defendant, it is the duty of the Defendant to rebut the presumption. In this case, evidence by both the Appellants and the Respondent's witnesses show that the accident was caused by the minor who crossed the road without regard to the oncoming traffic. The cause of the accident is known. Since a minor cannot be guilty of contributory negligence, an action for damages for personal injuries should be dismissed where he is to blame for the accident. **See *Dilla v Rajan* (supra).** The Appellants therefore contends that the Respondent did not discharge the burden of proof to the required standard. The subordinate court ought to have dismissed the claim for lacking substance.

Respondent's Skeleton Arguments

25. The Respondent submitted that it is in evidence that the minor herein aged 4 was of very tender age and surely he cannot be reasonably expected to be acting as an adult on the road. Regarding the circumstances of this case, they did not find a single factor that would lead the court to conclude that the minor could equally be found to be negligent the court further said.

26. That in the within matter, considering the nature of the place where the accident occurred and the nature of the vehicle that the 1st Appellant was driving, even at 40Km/hr., the same was (high) speed. This was quite a high powered car and that speed cannot be stated to be slow speed as can be said to small cars. Otherwise the court is not inclined to believe that the driver was at that speed, he ought to have been at a higher speed than the one stated. This is the reason he failed to see the minor in time and stop to avert the accident and the minor had to sustain the stated serious injuries. In the premises, the court was satisfied that the accident was solely caused by the negligence of the 1st Appellant.

27. That in the arguments, the Appellants stated that there was no evidence adduced by the Respondent to substantiate negligence. This assertion is not supported by the court record.

It is clear from the record that the Respondent's witness was extensively cross-examined and reexamined after adopting his witness statement. It was established that the Respondent was hit on the dirty verge after the 1st Appellant swerved as the Respondent was walking ahead of the witness.

28. That the issue of the crossing the road was just created by the police officer who authored the report and was highly discredited in court. There was no crossing of the road. That if the Respondent was crossing the Road from left to right as alleged by the 1st Appellant, it would mean the 1st Appellant swerved to the offside lane and hit the Respondent. It would also mean he missed the left lane and followed the Respondent on the far right. In both scenarios, the 1st Appellant will still be to blame. The truth of the matter is that the Respondent was hit whilst walking on his right hand side of the road which is the left hand side of the 1st Appellant driver.

29. That the evidence shows that the 1st Appellant was careless in his speed. Although the Respondent witness did not state whether he saw the speedometer, he stood firm and stated that the motor vehicle hit the respondent on the dirty verge on the left side of the vehicle. In his typical 'Kotakota' language, the Respondent witness said the 1st Appellant 'anamuphudzula mwanayu akuyenda chakumanja' (child was hit as whilst walking on the child's right hand side of the road) in responding to a question in cross examination. On his part, the 1st Appellant said that child was dragged (kukhuludzika) for some distance and this is why he suffered injuries on the left leg. Actually, he stated that a motor vehicle is not something that can stop instantly.

30. That the court, will take judicial notice that indeed a motor vehicle cannot stop instantly if it is over speeding. Otherwise the emergency brake is designed to enable the driver to stop the car in case of an emergency. If the car is over speeding, the emergency brake causes the car to swerve or even overturn. Otherwise the car stops 'peacefully' if the speed is reasonable in the circumstances. This is why they believe the 1st Appellant was over speeding and applied the emergency brake on approaching Mkaika Trading Centre (also

known as Mwansambo Turn-Off) and due to over speeding, he swerved and hit the Respondent child on the nearside dirty verge.

31. That the witness statement showed that the 1st Appellant was an Assistant Human Resource Manager at Illovo (Nchalo). That there is no doubt he was going to Blantyre (or Nchalo). He was running out of time as by 17:30, the 1st Appellant was in Nkhotakota hence over speeding. On the other hand, it was early in the evening when his vision was also limited. That further, the nature of the injuries showed that the child was seriously and violently hit. The Respondent witness statement showed that the Respondent suffered open fracture of the left leg. Such injury is consistent with serious collision due to over speeding. Furthermore, Mkaika Trading Centre is enjoyed by all kinds of people, the young, the old, buyes and sellers. All these people were enjoying both the road and the market. In those circumstance, it was unreasonable for the 1st Appellant to drive the car without regard to all the people who might have been on the road.

32. That when asked as to why he reduced speed, the 1st Appellant said he was anticipating danger because he was approaching a trading center. He further said he was ready for an emergency brake should dangerous situation' occurs. The danger occurred and the 1st Appellant failed to avoid the accident and it is only fair to conclude that his preparation were not enough which a breach of the Law.

33. That in ***Mandiwa & Other V Star International Haulage & Co. Ltd & Another*** [1991] MLR 217 at 225, Unyolo J then said

"Pausing here let me say something about the law. I start with a settled principle that a driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if a sudden emergency arises.

34. That even if when the argument of crossing is taken on board, it was foreseeable to the 1st Appellant that the people who were standing on both sides of the road would think of

crossing it. It therefore imperative for him to approach the area with a speed that would enable him to stop instantly should one of them decide to cross.

Whether a minor can be contributorily liable

35. That the law is settled that a minor cannot be liable in negligence. They cited ***Dulla v. Rajani 11*** MLR 113 which clearly stated that a minor cannot be held liable. In this case, the court quoted with approval the words of MR Denning in ***Gough v Throne*** pages 116-117:

A very young cannot be guilty of contributory negligence. An older child may be; it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such and age as reasonably to be expected to take the precautions for his or her own safety and he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense or experience of his or her elders. He or she is not guilty unless he or she is blameworthy.

36. That in the case of ***Mandiwa and others v. Star International Haulage Co. Ltd***, [1991] 12MLR 217, a child of 5 years old was held to be too young to be expected to take care of his own safety. That in the present case, we are talking of a 4 year old child. The 1st Appellant could not expect a child to be responsible for his safety. Actually being a market day, such children were too many and the 1st Appellant was required to be extra careful. Thus even if they agree with the 1st Appellant on crossing, the Respondent cannot be liable or be accused of contributing to the accident. That this is the correct position of the law and is applicable in criminal law as well under the principle of doli *incapax.*

37. That you cannot blame a 2, 3, 4 or year old children for causing accidents and they cited the holding of Mtegha J then in the ***Rajan*** case in advancing the position that the 1st Appellant was negligent. This position advanced by the 1st Appellant does not change the general principle that a young child cannot be accused of contributing to the causation of the accident. The general position remains the same and the other issues are particular or peculiar to each case and distinguishable from each case. So the circumstances are different.

Whether a magistrate could make a finding on the speed at which the 1st Appellant was driving without admitting evidence on the same.

38. That the Court concluded that the motor vehicle was over speeding after analyzing evidence from the Respondent and the 1st Appellant. It was the 1st Appellant's evidence that he was driving at 40km/hr. The court said this is not the case. However, over speeding is not about maintaining the speeding at 40km/hr. It is all about circumstances and 90km/hr may be reasonable speed whilst 20 or 40km/hr may be adjudged excessive depending on the nature of the road. On the road at hand, it was bumpy, narrow straight and a market full of people. Even at 40, it may be adjudged over speeding. Further, Counsel for the Respondent noted that the Respondent suffered multiple fractures and this was further confirmation of excessive speed.

Can a magistrate deduce speed from the surrounding factors.

39. That in the ***Mandiwa*** case (cited above) the judge also said:

It is also observed that the Highway Code exhorts drivers to use the horn to inform other users of their presence and to do so in plenty of time (rule 67 of the Code refers. Section 184(4) of the Road Traffic Act provides that failure on the part of any person to observe any provision of the Code may, in any proceedings as proceedings, civil or criminal, be relied upon by any party to the proceedings as tending to establish or negate any liable which is in question to those proceedings.

40. That consequently, the court faulted the defendant for not hooting despite knowing that there was a group of children knocking off from school who might decide to cross the road. In the present case, the 1st Appellant was approaching a busy trading center where people crossed the road anyhow. It was therefore important for him to hoot to warn any person who may not know the coming car to give way.

Whether the magistrate's decision was against wight of evidence given in Court.

41. That this has been answered already. The standard is on balance of probability and it was proved that the respondent was hit due to the negligence of the 1st Appellant. That all he had to show to the court whether he suffered injuries as a result of the negligent driving of

the 1st Appellant of the car insured by the 2nd Appellant. The evidence shows that the issue of injuries and insurance cover (liability of the 2nd Appellant) are not in dispute. What is in disputed is who is to blame for the accident. That marked the end of the submission from the Respondent.

Finding

42. This an appeal by the Appellants against the Judgment of the lower court that adjudged that the 1st Appellant negligently drove his motor vehicle and injured the Respondent. That the statement of claim alleged that the victim was a pedestrian along the M5 Road when he was hit by the 1st Appellant driving a motor vehicle marked CP 4283, Toyota Hilux which was insured by the 2nd Appellant. It was further alleged that due to the accident, he suffered injuries. During trial, it was proved that he was hit and injured by the 1st Appellant. It was further proved that the accident happened at Mkaika Trading Centre which is also known as Mwansambo Turn-Off which is naturally a busy area and on a market day.

43. On particulars of negligence, the lower court said: considering the nature of the place where the accident occurred and the nature of the vehicle that the 2nd Defendant was driving, even at 40Km/hr, the same was high) speed. The court further found that this was quite high powered car and that speed could not be stated to be slow speed as can be said to the small cars. I don't know how the court below came to this conclusion in the absence of an expert witness to come up with scientific measurements. Vehicles moving at the same speed travel at the same speed unless one is carrying a very load which can affect the speed at which the vehicle can stop. The court below believed that the driver was at that speed, and he ought to have been at a higher speed that the one stated. That this is the reason he failed to see the minor in time and stop to avert the accident and the minor had to sustain the stated serious injuries. In these premises, the court was satisfied that the accident was solely caused by the negligence of the 1st Appellant.

44. That the witness statement showed that the 1st Appellant was an Assistant Human Resource Manager at Illovo (Nchalo). That there is no doubt he was going to Blantyre (or Nchalo). He was running out of time as by 17:30, the 1st Appellant was in Nkhotakota hence over

speeding. On the other hand, it was early in the evening when his vision was also limited. I do not know the relevance of this statement as there was no evidence to back it up.

45. I'm in agreement with the holding in ***Malipa v Kalichero and Prime Insurance Company Limited*** **(supra)**, that the mere fact that an accident happened does not in itself impute that the 1st Appellant herein was negligent. The Respondent must adduce evidence of negligence to the requisite standard. The Respondent herein pleaded particulars of negligence and it was his duty to specifically prove the particulars to the extent to which the 1stAppellant caused the accident.

46. However I'm in agreement with the Respondent herein that Mkaika Trading Centre is used by all manner of people, the young, the old, buyers and sellers. Being a market day, such minor children were likely to be too many and the 1st Appellant was required to be extra careful. All these people were using both the road and the market. In that regard a driver of a motor vehicle had to make sure that due regard was given to all other road users. The 1st Appellant could have taken the condition of the road and the all the surroundings into consideration when he was approaching the trading center on a market day. A reasonable and competent driver has been defined as a driver who avoids excessive speed, keeps a good lookout and observes traffic signs and signals. ***Banda and others v ADMARC and another*** (1990) 13 MLR 59

47. That during the hearing of the matter when the asked as to why he reduced speed, the 1st Appellant said he was anticipating danger because he was approaching a trading center. He further said he was ready for an emergency brake should a dangerous situation' occurs. I agree with the Respondent that danger occurred and the 1st Appellant failed to avoid the accident and it is only just to conclude that his preparation of the impending danger was not enough which was in breach of the duty he owed other road users.

48. I'm fortified by the case of ***Mandiwa & Other V Star International Haulage & Co. Ltd & Another*** [1991] MLR 217 at 225, Unyolo J then said

"Pausing here let me say something about the law. I start with a settled principle that a driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if a sudden emergency arises.

49. In my considered view, I agree with the Respondent that even when the argument of crossing is taken on board, it was foreseeable to the 1st Appellant that the people who were standing on both sides of the road young and old would think of crossing it. It was therefore imperative for him to have approached the area with due diligence and care at a speed that would enable him to stop instantly should one of them decide to cross. It is because he was at high speed that the current accident occurred which resulted in the Respondent sustaining damage. The 1st Appellant here according to the evidence could have travelled at a slow speed as to make sure that he was able to brake whenever danger approached. The evidence show that he was driving at a speed which was inconsistent with the condition of the road at that time at Mkaika Trading Center and on a market day.

50. Unfortunately for the Appellant even if the victim was to blame the law protects very young persons from liability. The victim herein was only 4 years old. I have read ***Dulla v. Rajani*** *11* MLR 113 which clearly stated that a minor cannot be held liable. In this case, the court quoted with approval the words of MR Denning in ***Gough v Throne*** pages 116-117: I find that the 1st Appellant was wholly to blame for this accident.

A very young cannot be guilty of contributory negligence. An older child may be; it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such and age as reasonably to be expected to take the precautions for his or her own safety and he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense or experience of his or her elders. He or she is not guilty unless he or she is blameworthy

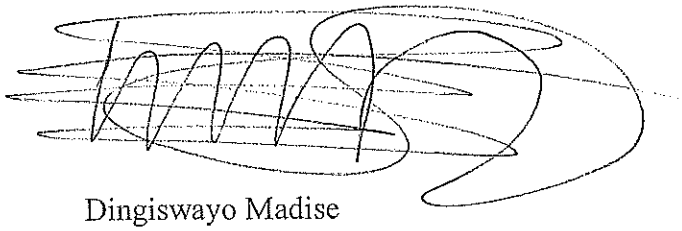
51. Looking at the evidence before me and the law and the reasons given and on a balance of probabilities, I fail to find errors in the decision of the court below. As was stated in ***Blyth vs Birmingham Water Works*** (1856) I Ech 781 at 784. Which I cite with approval

"Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

The tort demands that a defendant must owe the claimant a duty of care. I therefore dismiss all the grounds of appeal in totality and I condemn the Appellants in costs.

I so order

Pronounced in open court at Blantyre in the Republic on 4th August 2022



Dingiswayo Madise

Judge